

## 10 *Official Opinions of the Compliance Board 46 (2016)*

- ◆ 4(F) CLOSED MEETINGS – PUBLIC SECURITIES MARKETING  
EXCEPTION: NOT APPLICABLE TO DISCUSSIONS ABOUT THE  
PROJECT FOR WHICH BONDS ARE PROPOSED
- ◆ 5(C)(3) CLOSED SESSION PROCEDURES – WRITTEN STATEMENT –  
OMITTING REASON FOR CLOSING, VIOLATION

\*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at [http://www.oag.state.md.us/Opengov/Openmeetings/OMCB\\_Topical\\_Index.pdf](http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf)

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May 23, 2016

Re: Project Review and Oversight Committee of the  
Baltimore Development Corporation  
Joanna Sullivan, for Baltimore Business Journal,  
Fern Shen, for Baltimore Brew,  
Trif Alatzas, for The Baltimore Sun, *Complainants*

Complainants allege that the Baltimore Development Corporation's Project Review and Oversight Committee ("Committee") violated the Open Meetings Act by excluding their reporters from closed meetings that the Committee held on March 9, 2016, and March 15, 2016. Complainants allege that the Committee closed the meetings to discuss a developer's tax increment financing ("TIF") proposal for the redevelopment of Port Covington, a site in Baltimore City. They state that every step of approval of such financing is of "critical importance" to the public because the proposed issuance of bonds would impact the city's debt limit and bond rating, and that the public was not served by the secrecy of the meeting.

The Baltimore Development Corporation ("BDC"), by its chairman, has responded on the Committee's behalf. BDC states that both meetings were properly closed under § 3-305(b)(6).<sup>1</sup> That provision is one of the Act's exceptions to the broad requirement of § 3-301 that public bodies "shall meet in open session," and it permits a public body to close a meeting to "consider the marketing of public securities." The confidentiality permitted by the Act

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<sup>1</sup> Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code, where the Act is codified.

for this topic is only temporary; the minutes of sessions closed under § 3-305(b)(6) must be unsealed “when the public securities being discussed have been marketed.” § 3-306(c)(ii). As required by the Act, we will construe the exception “strictly,” “in favor of open meetings of public bodies.” § 3-305(a).

The primary question before us is whether the closed-meeting discussions fell within the exception for the “marketing of public securities.” The submissions also raise a question about whether the Committee made the requisite disclosures before it excluded the public. For the reasons explained below, we conclude that the Committee violated the Act by meeting in closed session before it stated its reasons for excluding the public and then by discussing in closed session matters that did not fall within the claimed exception.<sup>2</sup>

**1. Whether the closed-session discussions pertained only to the “marketing of public securities”**

BDC has provided us with its sealed minutes of the Committee’s two meetings. Under § 3-206(c)(3), we are to “maintain the confidentiality” of sealed minutes. That requirement ordinarily limits the detail in which our written opinion can discuss whether a particular discussion fell within the statutory provision, or “exception” that the public body claimed as authority for the closed session. Here, however, the open-session minutes of BDC’s March 24 meeting provide us with information that we may disclose about the Committee’s closed session discussions. At BDC’s March 24 meeting, the minutes show, BDC’s chair, “[o]ut of an abundance of caution to comply with the Open Meetings Act,” asked several people who had attended the Committee’s closed sessions to repeat their answers to questions that had been asked in the closed sessions.<sup>3</sup>

As reported in BDC’s open-session minutes, the questions and answers that the Committee addressed in closed session pertained to the following: (1) memoranda of understanding “in process with the mayor’s office and the developer” involving “affordable and inclusionary housing,” “workforce development,” and “support of small local, minority and women

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<sup>2</sup> It appears that a majority of BDC’s members attended the closed sessions. If a majority comprises a quorum of BDC, then BDC violated the Act also. We need not resolve that question in order to render an advisory question on this complaint.

<sup>3</sup> The Act does not provide that a public body complies with its open-meetings mandate by meeting secretly and then later disclosing parts of the discussion. When a closed-session discussion begins to stray beyond the claimed exception, the presiding officer must stop the discussion. If the public has expected the public body to return to open session, the public body may instead adjourn its closed session and continue the discussion in the open.

owned businesses” ; (2) city master plans and the rail spur proposed by the developer; and (3) other sources of funding for the project and the need to ensure that the developer’s requests for funding from other sources “are consistent with other requests being made to the Department of Recreation and Parks and the Department of Transportation.”

These topics did not fall within the exception that gives a public body the discretion to close a meeting in order to “consider the marketing of public securities.” § 3-305(b)(6). First, as we explained in 9 *OMCB Opinions* 15 (2013), where the city’s Board of Finance had also claimed the securities marketing exception as authority for discussing a TIF proposal behind closed doors, the exception does not extend to topics such as “changes to the site map” or the “characteristics of the site and project.” *Id.* at 28. To be clear: the fact that a TIF proposal might eventually lead to an entity’s marketing of bonds does not mean that a BDC committee may shield from public view its discussions about the developer’s proposed use of the site and the items to be included in the TIF.

Furthermore, the Committee was not considering marketing public securities. Instead, it was considering whether to recommend that BDC ask the Board of Finance to recommend to the City Council the adoption of ordinances that would lead later to steps that would result in the marketing of the bonds.<sup>4</sup> To us, the requirement of unsealing closed minutes “when the public securities being discussed have been marketed” pre-supposes that the exception applies to a discussion of a bond issuance that is not merely hypothetical and that is held by a public body with a role in the actual issuance and marketing of the bonds. Thus, in 9 *OMCB Opinions* 15, after describing Baltimore City’s multiple-step and multiple-entity TIF process, we expressed our doubt that the exception would apply even to a Board of Finance discussion held when “the City had yet to adopt the enabling ordinance to authorize the issuance of any TIF bonds to be marketed.” *Id.* at 17-18, 28. Here, we find the connection between the topics described in

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<sup>4</sup> BDC’s March 24 minutes report this description of the “next steps”:

If the Board makes a favorable recommendation to the Mayor, the [TIF] request is then referred to the Board of Finance, at that time the Board of Finance will conduct due diligence and they will make the determination to move forward, from there legislation will be developed, then it goes before the City Council in the form of a resolution which will establish a development district, a special taxing district and to issue the bonds for the public infrastructure. It was noted that if the City Council approves the legislation, the bonds would not be issued at that time, the approval would authorize the Board of Finance to issue the bonds at a later date in multiple phases.

BDC's minutes and the "marketing of securities" to be too attenuated for the exception to apply.

We turn next to the other topics that the Committee discussed in the closed session and that we must keep confidential under § 3-206(c)(3). From the sealed minutes, we cannot ascertain whether any of the Committee's discussions at this early stage of the TIF process contained confidential information that, if disclosed, would impact the actual "marketing" of the proposed securities such that the minutes must be kept sealed until the securities (if approved and issued) are marketed. *See* § 3-306(c)(4)(ii). For example, the mere fact that "financials" were discussed does not mean that the exception applies to the discussion of the facts assumed in the financial analysis. As above, discussions about the characteristics and scope of the project do not fall within the exception; there must be a direct connection between the topic and the marketing of securities.

Had the Committee specified, in its written closing statement and in the course of voting on a motion to close, the reason for shielding its discussion of each topic, we might have been able to see the connection between some of the topics discussed and the eventual marketing of any securities that might be approved and issued. More to the point, the members themselves might have perceived the lack of connection between various topics and the "marketing" of public securities. That leads to the next question: whether the Committee sufficiently disclosed its reasons for excluding the public from the sessions.

## **2. Whether the Committee made the required written disclosures when it voted to close the meetings**

A public body may not meet in closed session to discuss an excepted topic until its presiding officer has conducted a public vote to close and has prepared a written statement that contains three items of information: the topics to be discussed in the closed session, the statutory exception that authorizes the exclusion of the public from each discussion, and the reasons for excluding the public from the discussion of those topics. § 3-305(d); *see also* 9 *OMCB Opinions* 15, 22-24 (2013).

As we explained in 9 *OMCB Opinions* 15, each of the three items in the written statement serves a distinct purpose and must be included. *Id.* at 22-24. Among other things, a written statement serves as the agenda for the closed session, and when properly completed, helps the presiding officer keep the discussion within the scope of the exception. We explained these

same principles to BDC in 9 *OMCB Opinions* 46, 50 (2013). We incorporate that guidance here.<sup>5</sup>

Here, the Committee's written statements do not provide the Committee's reasons for excluding the public from the discussion. Occasionally, as explained to BDC in 9 *OMCB Opinions* 46, a reason for secrecy is obvious from the topic that a public body has specified. Here, however, the listing of the topics as "financial analysis," "bonds to be discussed/analysis," "financials," and "numbers analysis" do not tell the public why the Committee members voted to exclude the public from the discussion. As importantly, as implicitly recognized at the BDC's March 24 meeting, that list did not serve to confine the members' discussion of the TIF proposal to only the topics that fell within the securities marketing exception.

### **Conclusion**

We conclude that the Committee violated §§ 3-301 and 3-305 by discussing in a closed session a number of topics that did not fall within the exception that the Committee had cited as authority for the closing. We further conclude that the Committee violated § 3-305(d) by failing to disclose its reasons for its decision to exclude the public from the discussion.

Open Meetings Compliance Board

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<sup>5</sup> Those opinions are posted at <https://www.oag.state.md.us/Opinions/Open2013/9omcb15.pdf> and <https://www.oag.state.md.us/Opinions/Open2013/9omcb46.pdf>.